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72-399

SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-399

JOHN L. WILLIAMS,
District Attorney General,

Petitioner,

v.

LILLY MAE ONIE LEE WHITELAW HILLIARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE NOT PRINTED

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No. _____

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JOHN L. WILLIAMS,
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v.

LILLY MAE ONIE LEE WHITELAW HILLIARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, John L. Williams, District Attorney General for the Twenty-Second Judicial District of Tennessee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 28, 1972.

OPINIONS BELOW

The Sixth Circuit on petition for rehearing amended slightly its opinion by order which is here reproduced as Appendix A. The opinion of the Sixth Circuit, ___ F.2d ___,

not yet reported, is reproduced as Appendix B. The memorandum opinion of the United States District Court for the Western District of Tennessee is not reported and is reproduced as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 28, 1972. The order on the petition for rehearing was entered July 31, 1972. This petition for certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issue presented is the immunity of a District Attorney from a suit for money damages under the Civil Rights Act on the allegation that plaintiff's conviction was obtained by the prosecutor's knowing use of perjured testimony.

STATUTORY AND RULE PROVISIONS INVOLVED

28 United States Code Sec. 1343(3):

"§ 1343. Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of

Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

42 United States Code Sec. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the part, injured in an action at law, suit in equity, or other proper proceeding for redress."

Federal Rules of Civil Procedure, Title 28, United States Code:

Rule 12.

"Defenses and objections —when and how presented— by pleading or motion—motion for judgment on the pleadings

. . .

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . .

(6) failure to state a claim upon which relief can be granted, . . ."

STATEMENT OF THE CASE

The complaint was filed in the United States District Court for the Western District of Tennessee, Eastern Division, alleging that defendant Williams, a district attorney general whose jurisdiction includes, among other counties, Carroll County, Tennessee, together with defendant Clark, a Tennessee Bureau of Identification agent, presented information they knew to be perjured to a jury in that county which resulted in the conviction of plaintiff for murder. The defendant district attorney moved to dismiss pursuant to Federal Rule 12(b)(6) because the complaint failed to state a claim upon which relief could be granted because of his official position as a quasi-judicial officer.

The United States District Judge, Honorable Harry W. Wellford, granted the motion to dismiss but denied a similar motion as to the investigating agent, co-defendant Clark. The district judge and subsequently the Sixth Circuit granted an interlocutory appeal to the plaintiff as to defendant Williams pursuant to 28 U.S.C. §1292(b).

The Sixth Circuit in an opinion by Chief Judge Phillips with the concurrence of Judges Edwards and McAllister held that the district attorney general did not enjoy immunity under the allegations of the complaint. The case was reversed and remanded for further proceedings not inconsistent with the opinion.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Sixth Circuit conflicts with other Courts of Appeal.

Since the passage of 42 U.S.C. §1983, research shows only four cases against the prosecutor which have previously survived a motion to dismiss. Three are in the Fifth Circuit[1] and the fourth in the Ninth Circuit.[2] The fifth is the instant case.

---

[1] (1) **Lewis v. Brautigam**, 227 F.2d 124, 129 (5th Cir. 1955) (District Court dismissed for failure to state a claim upon which relief can be granted.) (**Held**, reversed as to prosecutor Brautigam on the charge that he conspired with police officers to coerce a confession from plaintiff through photographs for which the prosecutor approved a bill for seven hundred dollars) ("(I)t cannot be held that such acts (forcing plaintiff to plead guilty) were either within the scope of his jurisdiction as State's attorney, or were authorized by law.")

(2) **Madison v. Purdy**, 410 F.2d 99 (5th Cir. 1969) (The Fifth Circuit was faced with an appeal from an order dismissing a suit against Mr. Gerstein, the Dade County State's attorney, charging him with improper conduct in charging plaintiff Madison with torture of his baby. The district court dismissed and the court of appeals reversed on authority of **Lewis v. Brautigam**, 227 F.2d 124 (5th Cir. 1955) holding the attorney cannot shield himself from liability by the plea that he is acting under color of office.") (On remand, the district court again dismissed the case and this time the Fifth Circuit affirmed **sub. nom. Madison v. Gerstein**, 440 F.2d 338, 340 (5th Cir. 1971), based on a stipulation of fact that Mr. Gerstein had no personal knowledge of the facts.)

(3) **Shaw v. Garrison**, (Civil No. 70-466-B, U. S. Dist. Ct., E.D. La., New Orleans Division) (Motion to dismiss of District Attorney Garrison denied. Trial judge certified pursuant to 28 U.S.C. § 1292(b) but Fifth Circuit denied leave to appeal) (Petition for certiorari and mandamus against Chief Judge Brown of Fifth Circuit denied, **Garrison v. Brown**, 405 U.S. 985 (1972). The allegations made by Mr. Shaw concern conduct by the District Attorney outside the courtroom and clearly beyond the duties of a prosecutor. .

[2] **Robichaud v. Ronan**, 351 F.2d 533 (9th Cir. 1965) (**Held**, summary judgment by District Court in favor of prosecutors reversed.) (Prosecutional immunity does not apply to claim that 17 year old girl, held twenty-five days in adult "drunk tank," was overreached by prosecutors whose acts were acts ordinarily related to police activity as opposed to judicial activity.)

In the earlier cases the courts were careful to point out that when a prosecuting attorney acts in a capacity other than his quasi-judicial capacity, the reason for his immunity ceases to exist. The Ninth Circuit in *Robichaud v. Ronan*, *supra*, even in that anomalous case, gave lip service to the rule that the immunity of the prosecutor is absolute if "the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process." *Robichaud*, *supra*, 351 F.2d, at 536, also quoting with approval from *Kenny v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956) *certiorari denied* 352 U.S. 855:

> "A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation."

The Fifth Circuit has vacillated in following its own rules somewhat. *Compare* the three cases earlier cited[3] *with Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970).

Against the three Fifth Circuit cases, *supra*, the Ninth Circuit case, and the present case are hundreds of cases upholding the absolute immunity of the District Attorney. For example, the Ninth Circuit in *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir. 1969) *certiorari denied* 395 U.S. 947 upheld summary dismissal of a Civil Rights suit against a District Attorney who it was charged "knowingly and wilfully, or with gross negligence, presented perjured testimony to the grand jury investigating appellant's activities and that appellees wilfully and deliberately sup-

[3] Lewis v. Brautigam, Madison v. Purdy, and Shaw v. Garrison (all Fifth Circuit cases). Lewis v. Brautigam was criticized severely as being contrary to "the great weight of authority" as to the immunity of prosecutors under the Civil Rights Act in Stift v. Lynch, 267 F.2d 237, 239 (7th Cir. 1959).

pressed from the grand jury exculpating evidence within their knowledge."

The District Court in *King v. Rouse*, 316 F. Supp. 1039 (W.D. Va. 1970) summarily dismissed a Civil Rights action on a charge that the District Attorney knowingly used perjured testimony to obtain plaintiff's conviction.

Some suggestion was made at oral argument in the District Court that these hundreds of cases upholding the immunity of the District Attorney where he is charged with acting maliciously or corruptly can be distinguished because most are filed *pro se* and state the charges in conclusory terms. The unspoken premise is that in the instant case the plaintiff is represented by skilled attorneys whose pleadings articulate more clearly the underlying reasons supporting the conclusions drawn by the plaintiff. Yet when in our system of justice has this been a proper criterion?

The Sixth Circuit in its opinion nowhere adverts to the many cases it has summarily dismissed on charges just as serious as the instant one. Sixth Circuit cases contra to the present case are:

1) *Puett v. City of Detroit*, 323 F.2d 591, 593 (6th Cir. 1963), *cert. den.* 376 U.S. 957, ("It seems clear that under the principle of judicial immunity no cause of action lies against the Municipal Judges, the Assistant Prosecuting Attorney, and the Corporation Counsel of the City of Detroit.")

2) *Kenney v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956) *cert. den. sub nom. Kenney v. Killian*, 352 U.S. 855, ("A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction

over the parties and the subject matter of the litigation.") (Speaking of judicial immunity to which the prosecutor's immunity was equated: "The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence . . . But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed." *Id.*, at 291, quoting *Bradley v. Fisher*, 13 Wall. 335, 354).

3) *Hurlburt v. Graham*, 323 F.2d 723, 725 (6th Cir. 1965) ("The justice of the peace and the prosecuting attorney were not liable under the Civil Rights statutes because of the principle of judicial immunity.") (The prosecuting attorney was charged with knowledge of the conspiracy of "giving false versions ... in the trial of the case" and "failing and neglecting to prevent the other defendants from consummating it." *Ibid.*)

4) *Gabbard v. Rose*, 359 F.2d 182, 185 (6th Cir. 1966) ("The prosecuting attorney enjoys the same immunity as that which protects the judge.")

5) *Peek v. Mitchell*, 419 F.2d 575, 579 (6th Cir. 1969) ("The law is quite clear that prosecuting officials are not liable under the Civil Rights Act for damages in connection with official prosecutions.")

A scholarly exposition of the absolute immunity of the prosecutor is the opinion of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949):

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his

spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books."

Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) was an *en banc* opinion in which the judges held that in an action under the Civil Rights Act, 42 U.S.C. §1983, a county prosecutor enjoys the same immunity as a judge. The exhaustive opinion cites and explains not only about a hundred cases but the legislative history of the act.

The Third Circuit in a case decided since this Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), held the FBI agent defendant must stand trial but the Assistant U. S. Attorney defendant was immune from damages on charges of conspiracy to obtain the conviction of the plaintiff through perjured testimony. *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972). The opinion in that case is reproduced as Appendix D. The opinion makes clear the irreconcilable differences extant between the Third and Sixth Circuits which this Court should resolve.

II.

The Sixth Circuit's Opinion in this case is in conflict with applicable decisions of this Court and settled case law.

A. Authorities from this Court

Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926) *aff'd* 275 U.S. 593 (1927) was an action for money damages by Yaselli, a former Assistant United States Attorney named as a defendant in a criminal case in the Southern District of New York. Goff was Yaselli's prosecutor. It was alleged Goff had falsely and maliciously charged the plaintiff with a crime and "corruptly caused to be introduced and used before the aforesaid grant jury a great mass of false ... evidence." The District Court dismissed the complaint. The Second Circuit in a lengthy opinion reviewed the American and English authorities, and concluded the prosecutor enjoyed absolute immunity even though he acted maliciously and corruptly. This Court affirmed, saying, "Affirmed on the authority of *Bradley v. Fisher*, 13 Wall. 335, 347; *Alzua v. Johnson*, 231 U.S. 106, 111."

When this Court first approved the doctrine of judicial immunity in *Bradley v. Fisher*, 80 U.S. 335, 348 (1871), it was held that "if civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away."

The fundamental rule of judicial, or official, immunity was also recognized by this Court in *Pierson v. Ray*, 386 U.S. 547, 554 (1967), in which it was expressly found that there was no evidence that, in enacting the Civil Rights Act, "Congress meant to abolish wholesale all common-law immunities", and accordingly held that the well-established "immunity of judges from liability for damages for acts committed within their judicial jurisdiction" had not been abolished by Congress and was applicable in actions under the Civil Rights Act.

This Court, relying on *Bradley v. Fisher*, *supra*., 80 U.S. 335 (1871), also noted that "this immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'"

In *Barr v. Matteo*, 360 U.S. 564 (1959), this Court held that "the fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint."

B. Other Authorities:

Speaking of the immunity of the prosecutor for wrongs committed in his official capacity, it is said, F. Harper and F. James, *The Law of Torts* §4.3 (1956):

> "If the attorney is an officer of the State, such as a prosecuting attorney or attorney general, it seems that he is protected by an absolute privilege and his immunity is indefeasible. He is said to be a judicial officer or an officer who performs 'quasi-judicial' functions."

The rationale for the absolute immunity of judges and prosecutors is given in W. Prosser's *The Law of Torts*, §132, at 987-988 (4th Ed. 1971):

> "The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given ...
>
> "On this basis judges always have been accorded complete immunity for their judicial acts within the jurisdiction of courts of justice, even when their conduct is corrupt, or malicious and intended to do injury. Even though a cynic might be forgiven for pointing out just who made this rule, the reason is of course not a desire to protect the corrupt, malicious or misbehaving official, but rather the necessity of preserving an independent judiciary, who will not be deterred by the

fear of vexatious suits and personal liability, together with the manifest unfairness of placing any man in a position where his judgment is required, and at the same time holding him responsible according to the judgment of others."

Prosser lists nine justifications for the immunities of judges even when acting maliciously, *id.*, at n. 78:

1) Saving judges' time

2) Preventing influence on decisions through fear of subsequent suit

3) Removing a discouragement to judicial service

4) Separation of powers

5) Necessity of finality

6) Other opportunities for review of adverse decisions

7) Duty to the public only and not to individuals

8) Judicial self-protection

9) Unfairness in penalizing honest error saying, "(t)he same reasons, *mutatis mutandi*, are mentioned and applied as to other public officers."

In the *Restatement of the Law*, Torts §656, entitled "Absolute Privilege of Public Prosecutor", the authors say,

"*A public prosecutor acting in his official capacity is absolutely privileged to initiate or continue criminal proceedings.*" (Emphasis in original)

"The privilege stated in this Section is absolute. It protects the public prosecutor even though he knows that he has no probable cause for the institution of the proceedings and initiates them for an altogether improper purpose." *Id.*, at comment *b*.

"The absolute privilege of the public prosecutor under the rule stated in this Section is based upon the same policy of law which gives immunity from liability to a public prosecutor who, in the course of a criminal prosecution, publishes defamatory matter about the accused or third persons." *Id.*, at comment c.

This appears in 18 C.J. p. 1318 §46:

"A prosecuting attorney, being a judicial officer of the State, is not liable in damages for acts done in the course of his duty, although willful, malicious or libelous."

See also, 27 C.J.S. District and Prosecuting Attorneys §16 (Statement in the text: " ... not liable for acts done in the course of his duty, although willful, malicious, or libelous ..."); 42 Am. Jur. §21, Prosecuting Attorneys ("It is undoubtedly the majority rule that a public prosecutor cannot be compelled to answer to a private citizen for the performance of duties which rest upon him as a public official, since, as has been seen, prosecuting attorneys are quasi-judicial officers."); and Note, Civil Rights - §1983 - Prosecuting Attorney Held Immune from Civil Liability for Violation of Civil Rights Act, 42 N.Y.U. L. Rev. 160, 161 (1967):

"Instead, immunity has been extended to such quasi-judicial officers as prosecuting attorneys under general federal law and in section 1983 cases because of similar policy considerations: threatened litigation may affect their decision making; frivolous lawsuits might occupy a large portion of their official time; and potential liability might deter qualified people from entering public service. These policies have been held to outweigh the possible inequity suffered by a few individual claimants who might be subjected to oppressive official action.

It has been suggested that the election and formal removal procedures provide the most effective methods of checking the excesses of a public official."

III.

This is an important question of federal law which has not been, but should be, settled by this Court.

The present case breaks new ground.[4] *Yaselli v. Goff, supra*, the leading case decided by this Court, goes back to the '20's and was only affirmed in a *per curiam* order.

The Court decided the civil rights immunity of state judges in *Pierson v. Ray*, 386 U.S. 547 (1967). The legal officer's immunity should be examined now.

If the Court does not grant certiorari, the duly elected District Attorney for Carroll, Benton, Decatur and Hardin Counties, Tennessee, will have to go through the emotional and financial rigors of a trial. As Judge Learned Hand, speaking of the prosecutor's immunity, said in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949):

> "(T)o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

---

[4] The Complaint in **Shaw v. Garrison** was filed as an attachment to a motion filed with the Sixth Circuit in the present case, and is available to the Court as the Sixth Circuit Clerk has certified the entire record to this Court. The instances of wrongful conduct by Mr. Garrison took place for the most part **outside** the courtroom. We admit a District Attorney loses his immunity when he acts as an investigator or policeman. The complaint against Mr. Garrison charges incredible conduct clearly outside his immunity.

This case has significance beyond the interests of the immediate parties.[5] Many District Attorneys may reasonably expect to be named defendants in Federal Civil Rights actions where there is an aggressive prosecution. The more affluent the defendant, the more pressure he can bring to bear on the District Attorney by threat of a damage suit. Although urban prosecutors may be familiar with the federal courts, the procedures are frightening to many rural attorneys.

The law has not suffered a wrong without a remedy. Where evidence exists of improper conduct, criminal sanctions are available.[6] *See*, 18 U.S.C. §§241, 242 (Conspiracy against rights of citizens and Deprivation of rights under color of law).[7]

---

[5] Frank Carrington, Executive Director, Americans for Effective Law Enforcement, Inc., has advised that his organization hopes to participate as an **amicus curiae**. The National District Attorneys Association has advised similarly (letter from Executive Director Healy, dated February 7, 1972).

[6] One of plaintiff's attorneys, Mr. Maddox, formerly an Assistant United States Attorney, advised the writer that no complaint regarding the District Attorney's conduct was filed with the U. S. Department of Justice.

[7] **Title 18, United States Code**

"§ 241. Conspiracy against rights of citizens

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

"§ 242. Deprivation of rights under color of law

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or Dis-

(Continued on following page)

A prosecutor who abuses his trust may be impeached or disciplined by the Court. District Attorneys in Tennessee are elected by the people[8] for an eight year term.[9]

CONCLUSION

The Sixth Circuit decision in this case conflicts with other Courts of Appeal,[10] the affirmance by this Court in the leading case of *Yaselli v. Goff*, 275 U.S. 503 (1927), and is contrary to what was thought to be settled law. The present case provides a good vehicle for the Court to consider a recurring problem in a delicate and sensitive area of federal-state relations.

Respectfully submitted,

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(Continued from preceding page)

trict to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

8 Tenn. Code Annot. §§ 2-101; 8-702.

9 Tenn. Code Annot. § 2-102.

10 See e.g., **Kauffman v. Moss**, 420 F.2d 1270 (3rd Cir. 1970) (Holding that a Civil Rights complaint against the District Attorney of Montgomery County, Pennsylvania, charging that he, together with three law enforcement officers "conspired to secure [plaintiff's] convictions by the knowing use of perjured testimony" should be dismissed as to the District Attorney because of his official immunity).

APPENDIX A

[fol. 1] NO. 71-1983

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LILLIE MAE ONIE LEE
WHITELAW HILLIARD,
Plaintiff-Appellant,

v.

JOHN L. WILLIAMS,
Defendant-Appellee.

ORDER

(Filed July 31, 1972)

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and McALLISTER, Senior Circuit Judge.

The petition for rehearing having been considered, it is ORDERED that the first sentence of the last paragraph on page 11 of the slip opinion be amended by striking therefrom the words: "which cannot be determined without an evidentiary hearing."

Entered by order of the court.

/s/ James A. Higgins,
CLERK

APPENDIX B

[fol. 1] NO. 71-1983

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LILLY MAE ONIE LEE WHITELAW HILLIARD,
Plaintiff-Appellant,
v.
JOHN L. WILLIAMS,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed June 28, 1972.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and McALLISTER, Senior Circuit Judge.

PHILLIPS, Chief Judge. To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal.

The defendant-appellee is the District Attorney General for the Twenty-sixth Judicial District of Tennessee. He was prosecuting attorney at a trial resulting in the conviction

of plaintiff-appellant Hilliard for second degree murder. This conviction was reversed by the Tennessee Court of Criminal Appeals on April 15, 1971. At the second trial Mrs. Hilliard was acquitted. In the meantime she had served one year in prison.

The evidence upon which Mrs. Hilliard was convicted at her first trial was entirely circumstantial. A key issue was whether stains on the nylon jacket worn by her at the time of her arrest were blood stains, and, if so, whether the stains were from human blood as
[fol. 2] contended by the prosecution or hog blood as contended by the defense.

In reversing the conviction, the Tennessee Court of Criminal Appeals said:

"Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington, D.C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.

"Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's

rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. If it had been established as human, this would have left little room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.

"Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to [fol. 3] suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict."

Following her acquittal at the second trial, Mrs. Hilliard filed the present civil action for damages against the District Attorney General. Jurisdiction is asserted both on the ground of diversity of citizenship and under the civil rights act, 42 U.S.C. §1983 and 28 U.S.C. §1343(3).[1]

The District Attorney General filed a motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P. for failure to

[1] The other defendant is the Resident Agent of the Tennessee Bureau of Investigation, who filed an answer in the District Court. He is not a party on this appeal.

state a claim on which relief can be granted. The District Court sustained this motion, holding that the District Attorney General is immune from civil liability. We reverse, holding that the District Court erred in ruling that the complaint does not state a claim on which relief can be granted.

This is an interlocutory appeal under 28 U.S.C. §1292(b). The District Court certified that the order of dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The District Court also directed the entry of final judgment as to the District Attorney General making an express determination that there is no just reason for delay. Rule 54(b), Fed. R. Civ. P. This court granted leave to appeal.

Our reversal is based entirely upon the factual averments of the complaint, which are summarized hereinafter in this opinion. These averments must be treated as true for purposes of this appeal and are viewed in the light most favorable to Mrs. Hilliard. *Lucarell* [fol. 4] *v. McNair*, 453 F.2d 837 (6th Cir. 1972), *L'Orange v. Medical Protective Society*, 394 F.2d 57, 59 (6th Cir. 1968). "In appraising the sufficiency of this complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The complaint avers that Mrs. Hilliard is a citizen of Indiana; on or about December 24, 1969, she arrived in Carroll County, Tennessee, to visit her maternal aunt,

Vina Prince, and the aunt's husband, Ernie Prince; the purpose of her visit was to assert and settle her claim to a one-half interest in certain real estate inherited from her grandmother; Ernie Prince had operated the land for many years and had claimed ownership from time to time; on February 19, 1970, Ernie Prince was killed and Mrs. Hilliard was arrested and charged with his murder.

The complaint further states that at the time of her arrest Mrs. Hilliard was wearing a blue nylon jacket which the officers claimed was stained with the blood of Ernie Prince; the victim was murdered by two vicious axe blows to the skull, and the body thereafter was dragged to the rear of the house and shot in the mouth with a shot gun. Mrs. Hilliard asserted that when she was arrested there was no blood on her jacket, but if there were any such stains it was hog blood from preparing raw meat.

The complaint asserts that circumstantial evidence pointed the finger of guilt to Vina Prince, who is insane. The opinion of the State Court of Criminal Appeals pointed out that Mrs. Prince was not available as a witness, due to her mental condition. The court commented:

> "It is regrettable that she was not available as a witness ... Since there is no doubt that this woman was present before, during, and after the assault of the deceased, her potential as a witness is quite
> [fol. 5] evident. She could have witnessed the crime or have committed the crime herself."

It is averred that the only probative material evidence against Mrs. Hilliard was the allegedly blood stained jacket and some allegedly blood stained curtains; that the jacket and curtains were sent to the FBI laboratory in Washington, D. C., for analysis; that the FBI report

was negative as to human blood, or any blood, being on either the jacket or the curtains; that the District Attorney General saw the FBI report well in advance of the trial and was familiar with its contents; that neither the FBI report nor the jacket and curtains were made available to be introduced in evidence at the trial; that the contents of the FBI report were never divulged to Mrs. Hilliard or her attorney; instead, it was claimed by the prosecution that the jacket and curtains had been resubmitted to the FBI on April 28, 1970, at a time when the trial already had been set for May 15, 1970, too late for them to be returned in time for introduction in evidence; that the District Attorney General produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" blood stains, in spite of the FBI report that there were no blood stains; that the District Attorney General suppressed and concealed the positive proof that there was no blood on either the jacket or curtains; and that if the FBI report had been introduced into evidence, Mrs. Hilliard would have been acquitted at her first trial, as she was at the second.

The complaint further contains theses averments:

"22. That in the preparation of the case, the Defendant Williams advised or suggested or implied by some means that the witness Defendant Clark and perhaps others, should not mention anything about the first report of March 28, 1970, and that the Defendant Clark and other witnesses followed his instructions and answered both direct examination questions and cross-examination questions evasively, deliberately
[fol. 6] misleadingly, with half truths and in instances falsely, to carry out the complete suppression of the report of negative blood analysis of the items.

"23. That the Defendant Williams to carry out his intention of concealing and suppressing the report, contrary to any interpretation of good practice, and knowing that the defense expected the production of the jacket and report of the examination thereof for human blood, the Complainant insisting that there was no blood or if blood then animal blood, not human, announced that the State was ready for trial, well knowing he was not going to offer the jacket or curtains or the report, and that once the trial had commenced, the Complainant's defense counsel could not obtain the jacket or any report in time to use it for defense evidence in the trial, and thus suppressing and concealing the evidence which would acquit the Complainant.

"24. That the Defendant Williams when the Complainant's defense counsel demanded the production of the jacket, or a continuance until it could be produced, knowingly and deliberately advised the Court that through no fault of the State or prosecutors the jacket was not immediately available, as a witness had testified, when he knew or should have known by diligent inquiry that the same was in the T.B.I. office in Nashville, and would have required only two and one-half (2-1/2) hours to be available, and he well knew that the jacket was deliberately sent off on such a late date that its return by trial date was impossible, and he knew of the materiality of the jacket and report and should have announced its unavailability before commencement of the trial, and by these actions suppressed and concealed the evidence of the jacket and report favorable to the Complainant.

"25. That the Defendant Williams knowingly procured and allowed witnesses such as the Defendant

Donn Clark and perhaps others to mislead and deceive the Jury, Court, and criminal Defendant and her counsel,

[fol. 7] when he was aware of stronger evidence than that elicited from his witnesses, which was favorable to the criminal defendant, and failed and refused to reveal the favorable evidence and allowed the evidence he knew to be false to form the basis of the Complainant's conviction of murder in the second degree.

"26. That both Defendants continued to suppress and conceal the report from the Complainant's defense counsel, after the trial was concluded, knowing that the same would constitute a basis for a new trial for the Complainant and only disclosed the report when compelled by the opinion of the Court of Criminal Appeals which required that they do so, then revealing the same for the first time the 20th day of April, 1971.

"27. That the Defendants and each of them, by the suppression and concealment, and by trickery, deceit, fraud, unethical practices and conduct for a public official, contrary to their oath of office and in violation of the Defendant's right to a fair trial and due process, were the direct and proximate cause of the Complainant being illegally and unlawfully confined in either the Carroll County Jail or the State Women's Prison in Nashville, and wrongfully deprived of her liberty and freedom, and further the direct and proximate cause of unbelievable mental pain and anguish as a result of being unlawfully and wrongfully imprisoned and branded forever as a convicted murderess, suffered day and night behind prison bars and of her earnings during the period of illegal confinement, which is not yet at an end, but which commenced May 12, 1970.

"28. That thereafter, beginning on the 12th day of May, 1971, the complainant was retried in the Circuit Court of Carroll County, Tennessee, on the charge of murder, the said re-trial being concluded on May 13, 1971, by a jury verdict of not guilty.

"29. That the complainant and her counsel on that re-trial had the use and benefit, knowledge, and probative evidentiary document and report dated
[fol. 8] March 26, 1970, from the F.B.I. Laboratory, to the effect that their scientific examination revealed no evidence of any blood, of any kind, human or animal, and in the said re-trial all material aspects of the proof were the same except as to the said report.

* * *

"32. That the defendants individually, and jointly, by conspiring, combination, consort and agreement did conspire for the purpose of depriving either directly or indirectly, the complainant of the equal protection of the laws and of equal privileges and immunities under the laws; and under color of a state statute, ordinance, regulation, custom and usage of the State of Tennessee, caused the complainant to be subjected to the deprivation of her rights, privileges and immunities secured by the Constitution and laws of the United States, and while so doing were acting under color of state authority, and outside the scope of the jurisdiction of their respective offices, and without authority of law and that such actions were calculated or did, in fact, subject the complainant to a deprivation of her constitutional right to a fair trial and due process of law, and were the direct and proximate cause of the injuries, damages, wrongs and loss of liberty and freedom from May 13, 1970, to May 13, 1971, and as set out above."

It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. *Peek v. Mitchell*, 419 F.2d 575, 578 (6th Cir. 1970); *Huribut v. Graham*, 323 F.2d 723, 725 (6th Cir. 1963); *Kenney v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956). *See also Kaufman v. Moss*, 420 F.2d 1270 (3rd Cir. 1970).

However, the immunity of a prosecuting attorney from civil liability is not absolute:

"[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter [fol. 9] himself from liability by the plea that he is acting under color of office." *Lewis v. Brautigam*, 227 F.2d 124, 129 (5th Cir. 1955).

In *McCray v. State of Maryland*, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

"The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system." (Footnotes omitted)

To like effect see: *Madison v. Purdy*, 410 F.2d 99, 101 (5th Cir. 1969); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965). Cf. *Lucarell v. McNair*, 453 F.2d 837 (6th Cir. 1972); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Manning v. Ketcham*, 58 F.2d 948 (6th Cir. 1932).

See also the order of the Supreme Court denying application for mandamus and certiorari in *Garrison v. Brown*, —U.S. —, 10 Cr. L. 4226, March 20, 1972, involving an action for civil damages against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy.

The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

"EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents
[fol. 10] the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of

the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."

"DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity [fol. 11] and beyond the scope of "duties constituting an integral part of the judicial process." We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate supression of an FBI laboratory report establishing the innocence of the defendant.

Nothing in this opinion is intended to express any view as to the merits of the case, which cannot be determined

without an evidentiary hearing. We do no more than hold that the District Judge erred in dismissing for failure to state a claim on which relief can be granted.

Reversed and remanded.

APPENDIX C

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

LILLY MAE ONIE LEE WHITELAW HILLIARD,

Plaintiff,

v.

JOHN L. WILLIAMS and DONN CLARK,

Defendants.

Civil Action No. 2073

ORDER GRANTING DEFENDANT WILLIAMS' MOTION TO DISMISS

(Filed July 27, 1971)

This is a civil action for damages brought by Lilly Mae Onie Whitelaw Hilliard against John L. Williams, District Attorney General, State of Tennessee, and Donn Clark,

Resident Agent of the Tennessee Bureau of Identification arising out of plaintiff's conviction of second degree murder on May 12, 1970. The original complaint, which was filed on the pauper's oath, failed to set out any basis for this Court's jurisdiction. However, an amendment to said complaint indicates that this action was brought under the Civil Rights Act of 1964 [42 U.S.C. §1983 and §1985] and, consequently this Court has jurisdiction under 28 U.S.C. §1343(3).

Defendant Donn Clark filed an answer on June 16, 1971, generally denying the allegations as set forth in the complaint.

Defendant John L. Williams has moved the Court to dismiss this action pursuant to Rule 12(b)(6) F. R. Civ. P. for failure to state a claim on which relief can be granted in that he, as the prosecuting attorney, is immune from a civil action for damages because of his official position as a District Attorney General and quasi-judicial officer. He also contends that this action is barred by [fol. 2] the one year statute of limitations of T.C.A. §28-304.

Plaintiff's complaint sets out that in the course of plaintiff's prosecution for murder, defendants knowingly and deliberately suppressed or willfully failed to disclose to plaintiff or her attorney certain evidence which would have exculpated plaintiff and then willfully utilized testimony known to be misleading, false or incorrect, resulting in plaintiff's conviction for second degree murder. It appears that on May 13, 1971, plaintiff was retried in the Circuit Court of Carroll County, Tennessee, and was acquitted.

Appendix C, Order Granting Defendant's Motion to Dismiss

A prosecuting attorney when acting in his official capacity is immune from suit for damages under the Civil Rights Act, provided that his acts are within the scope of his jurisdiction and by authorization of law. *Peek v. Mitchell*, 419 F.2d 575 (6th Cir., 1970); *Madison v. Purdy*, 410 F.2d 99 (5th Cir., 1969); *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir., 1966), cert. denied, 386 U.S. 1021 (1967); *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir., 1968), cert. denied 395 U.S. 947; *Kalec v. Adamowski*, 406 F.2d 536 (7th Cir., 1969).

At the same time, "judicial officers, such as attorneys general, are not absolutely immune from civil rights liability simply as a matter of status or position and without regard to conduct." *Balistrieri v. Warren*, 314 F. Supp. 825, 826 (D.C. Wis., 1970); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir., 1965); *Spires v. Bottorff*, 317 F.2d 273 (7th Cir., 1963); *Guedry v. Ford*, 431 F.2d 660 (5th Cir., 1970).

Defendant Williams moves for dismissal because plaintiff has failed to state a claim on which relief can be granted. In such a case, the Court must accept as true all facts which are well pleaded in the complaint, and it must view such facts in the light most favorable to the
[fol. 3] plaintiff. *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Madison v. Purdy*, *supra*; *Ward v. Hudnell*, 366 F.2d 247 (5th Cir., 1966). Furthermore, "[i]n appraising the sufficiency of [a] complaint ... the accepted rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Intern'l Erectors v. Wilhort*

Steel Erectors and Rental Service, 400 F.2d 465 (5th Cir., 1968).

In order for a prosecuting attorney to enjoy immunity from suit under the Civil Rights Act he must have been engaged in the "performance of duties constituting an integral part of the judicial process." *Marlowe v. Coakley, supra*, at p. 70; see also *Corsican Productions v. Pilchess*, 338 F.2d 441 (9th Cir., 1964); *Peterson v. Slanczak*, 48 F.R.D. 426 (D.C. Ill., 1969); *King v. Rouse*, 316 F. Supp. 1039 (D.C. Va., 1970); *Balistrieri v. Warren, supra*.

The primary question therefore for determination is whether or not the defendant Williams committed acts outside of his quasi-judicial capacity and acted instead in the nature of an investigator. *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir., 1966) cert. denied 386 U.S. 1021 (1967); *Lewis v. Brauticam*, 227 F.2d 124 (5th Cir., 1955); *Robichaud v. Ronan, supra*; *Balistrieri v. Warren, supra*.

Confronted with very similar allegations to those in the instant suit, the Court in *Marlowe v. Coakley, supra*, held that such activities constituted "an integral part of the judicial process." id. at p. 71. In *Kalec v. Adamowski, supra*, plaintiff also charged that defendant state attorney had conspired with others in the presentation of perjured testimony. The Court held [fol. 4] that the claim arose out of defendant's quasi-judicial acts and, therefore, dismissed the action.

Likewise in *King v. Rouse, supra*, the claim was that the Commonwealth Attorney knowingly used perjured testimony to convict plaintiff. The Court held that defendant

was immune "from civil suit for acts committed in the performance of duties constituting an integral part of the judicial process." id. at p. 1040 (quoting *Marlowe v. Coakley, supra*).

See also *Ault v. States, Arzo Carson, District Attorney*, et al, ___ F. Sup. ___ (No. 6900, E.D. Tenn., 1970) aff'd ___ F.2d ___ (No. 20,301, 6th Cir., 1970).

The acts complained of in this cause occurred in the course of the judicial proceedings. The Court is of the opinion that such acts were not of an investigatory nature essentially, but rather were acts performed by defendant Williams in the course of his quasi-judicial functions and were, therefore, an integral part of the judicial process. Although the allegations made in the complaint represent serious charges which, if proven, are of concern to the plaintiff, this Court, and to the public, there is a remedy for the public to replace such officials at the polls. There is the counter-balancing concern of the Court to free prosecuting officials from vexatious, expensive, and worrisome charges, suits and actions brought by persons who are subjected to charges and actions under legal process for allegedly criminal acts.

Accordingly, the defendant is immune from this cause of action and defendant's motion to dismiss is hereby granted.

In the course of an oral hearing on this motion, both plaintiff and defendant moved the Court for an [fol. 5] order granting an interlocutory appeal to the appropriate party pursuant to 28 U.S.C. 1292(b). Subsection (b) provides that when a district court in a civil action makes an order which otherwise would not be appealable, the Court, if he is "of the opinion that such

order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," he shall so state in writing in his order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order. 28 U.S.C. 1292(b); 3 Barron and Holtzoff, *Federal Practice and Procedure* §1193, p. 15 (1970) Pocket Supplement). Furthermore, orders making a final disposition as to some but not all the parties in a case in which multiple parties are involved, will now be appealable if the court makes the requisite certificate. 3 Barron and Holtzoff, supra, §1193.2 at p. 25.

The question of immunity of prosecuting attorneys has resulted in conflicting judicial decision, and certainly is an area in which there appears to be substantial ground for differences of opinion. Indeed, in the course of the hearing in this matter, the representative of the State Attorney General, appearing on behalf of defendant Williams, indicated to the Court that it was a matter of serious, grave and immediate concern to the Attorney General and to the State.

Accordingly, the Court acting pursuant to its broad discretion under Rule 54(b) of the Federal Rules of Civil Procedure hereby directs the entry of a final judgment dismissing defendant Williams and makes a determination that there is no just reason for delay of plaintiff's appeal of this decision. *Woodby v. Chesapeake & Ohio Railway Co.*, 345 F.2d 668 (6 Cir. 1965).

[fol. 6]

Pursuant to 28 U.S.C. 1292(b), the Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order

may materially advance the ultimate termination of the litigation. An interlocutory appeal is granted pursuant to the provisions and requirements of said act, but the proceedings herein shall not be stayed pending the disposition of such appeal.

/s/ Harry W. Wellford
UNITED STATES DISTRICT JUDGE

Date:

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, ex rel.
James H. MOORE, Appellant,

v.

George KOELZER, et al.

NO. 71-1018.

Submitted Jan. 24, 1972.

Decided March 27, 1972.

Before BIGGS and VAN DUSEN, Circuit Judges, and GREEN, District Judge.

OPINION OF THE COURT

CLIFFORD SCOTT GREEN, District Judge.

Plaintiff, James H. Moore, Appellant, herein, filed a pro se Complaint in the United States District Court for the District of New Jersey demanding damages for alleged violations of his civil rights and of his Constitutional "rights to a fair trial." Also, he requested that defendants be enjoined from any "further deprivations of plaintiff's rights, privileges, and immunities as guaranteed by the laws and Constitution of the United States."

Defendant, George Koelzer, is an Assistant United States Attorney, Defendants, Antonius Genakos and Ralph Frank, are special agents of the Federal Bureau of Investigation. It is alleged in the complaint that defendants Genakos and Frank "did falsify a legal document" which was offered into evidence against appellant in a federal criminal prosecution; also, said defendants, as witnesses in the criminal trial, are alleged to have given "false testimony under oath." The other defendant, Koelzer, is alleged to have solicited the "fraudulent testimony." Plaintiff contends the aforesaid conduct was directed against him "because he is a black man and muslim." In the criminal trial, appellant was convicted and is presently incarcerated in the Federal Penitentiary at Leavenworth, Kansas.

A motion to dismiss the complaint was filed on behalf of all the defendants and affidavits were filed in support thereof denying the allegations of the complaint and specifically denying any "dealings" by defendants with

the plaintiff other than in their official capacities. An affidavit by appellant reiterated the charges.

The District Court granted the motion to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted. Plaintiff appealed.

Preliminarily, it is clear that the District Court has jurisdiction under 28 U.S.C. Sec. 1331(a) which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The hand-written complaint which contains a demand for judgment of "$10,00,0000" may be construed as containing a sufficient allegation that the matter in controversy is of a sum or value in excess of ten thousand dollars.

Appellant bases his cause of action on violations of his civil rights under 42 U.S.C. §§ 1981-1983, and on violation of his "rights to a fair trial" under the Constitution.

This Circuit has held that a cause of action for damages does not accrue under 42 U.S.C. §§ 1981 et seq. for alleged violation of the Act by federal officers acting under color of federal law. Bethea v. Reid, 445 F.2d 1163 (1971). Thus, if a cause of action exists, it must be based on a violation of a constitutionally protected right of plaintiff.

Subsequent to the dismissal by the District Court, the Supreme Court of the United States in an opinion by Mr. Justice Brennan held that a violation of the Fourth Amend-

ment right to be secure against unreasonable searches and seizures gave rise to an action for damages in the federal district court against federal agents, absent a right to immunity. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (June 21, 1971).

[1] Thereafter, relying on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, this Court in Bethea v. Reid, supra, held that a complaint which alleged violations of Fourth and Fifth Amendments rights stated a claim upon which relief could be granted.

[2] In this action, we do not have a charge of a Fourth Amendment violation; however, there are sufficient allegations of Fifth Amendment violations to support an action for damages. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to Fourth Amendment violations.

[3] Thus, unless there is immunity from suit, the complaint states a claim upon which relief can be granted. However, in Bethea v. Reid, supra, this Court held that an Assistant United States Attorney is clothed with judicial immunity when acting in his official capacity. The complaint and defendant Koelzer's affidavit both clearly indicate that his only "dealings" with plaintiff was in his official capacity, and, accordingly, he is entitled to immunity.

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, the Supreme Court declined to consider the defense of immunity raised by the federal agents because it had not been passed upon by the Court of Appeals. Similarly, in Bethea v. Reid, supra, this

Court declined to decide the question of judicial or executive immunity for the special agents involved, preferring to await a fuller development of the facts. We will follow the same procedure in the present case.

Accordingly, the order of the District Court will be affirmed insofar as it dismissed the complaint against the defendant, Koelzer, Assistant United States Attorney, and reversed and remanded for further proceedings not inconsistent with this opinion as to the remaining defendants.

VAN DUSEN, Circuit Judge (concurring).

I agree with the opinion of Judge Green and the result it reaches, but, in view of the preparation of this pro se complaint by a layman-prisoner,[1] the second full sentence on page 2 of the majority opinion, and the complaint's reliance on 18 U.S.C. § 241,[2] I believe the allegation that Genakos and Frank "did willfully and knowingly with malice aforethough[t] conspire with George Koelzer to commit the above mention[ed] criminal acts" is also significant. See Griffin v. Breckenridge, 403 U.S. 88, 102, (1971); Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971).

Circuit Judge BIGGS concurs in the views expressed in District Judge GREEN's opinion and also in those expressed in Circuit Judge VAN DUSEN's opinion.

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[1] See Richardson v. Miller, 446 F.2d 1247, 1248 (3d Cir. 1971).

[2] 18 U.S.C. § 241 contains this wording:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .

* * * *

They shall be fined . . . or imprisoned . . . or both; . . ."
Cf. 42 U.S.C. § 1985.